requests the judgment to be set aside to enable him to file a declaratory suit.

In reply to the applicant's affidavit the respondent files an affidavit setting out fully the facts and proceedings prior to this action.

Mr. Raj, counsel for the applicant, seeks to rely on the cases of *Dyson* v. *Attorney-General*[1] at pages 411 (para 6) and 417 and *Francis* v. *Yiewsley and West Drayton Urban District Council.*[2] In both the above cases it was held that a declaratory action could be taken in the High Court. He also referred to the case of *Evans* v. *Bartlam*[3] at p. 650 and *L. W. Cyris* v. *K. G. A. Gunadasa,*[4] which I shall deal with later.

Mr. Chang Min Tat for the respondent stated applicant had to produce evidence that he had a good defence. The applicant's affidavit was not an affidavit of merit. Respondent was acting within the scope of the Income Tax Ordinance, 1947, and there was nothing illegal or *ultra vires.* The objections made by the applicant were entertained by the respondent and according to para 29 of respondent's affidavit, on the 26th May 1961 the Board of Review dismissed the appeal. The applicant failed to appeal to the High Court and by his failure to do so and under the old provision of section 80 of the Income Tax Ordinance, 1947, the assessment as made was final and conclusive.

As applicant had taken no further steps in the proceedings this suit was filed and judgment obtained in default of defence.

In my opinion, the only question to decide is whether applicant has a good defence to this action. In the case of *L. W. Cyris* v. *K. G. A. Gunadasa supra,* referred to by Mr. Raj, Spenser Wilkinson J. stated —

"The principles which govern the question of setting aside default judgments are laid down by the House of Lords in the case of *Evans* v. *Bartlam,* the relevant part of the headnote of which, as reported in the Times Law Reports, is as follows:—

"**Held,** . . . . . that unless and until the Court has pronounced a judgment, on the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The Court of Appeal is not limited to interfering with a Judge's exercise of discretion only if it is of opinion that he acted on some wrong principles of law, but has both the power and the duty to interfere if it is seen that on other grounds the Judge's decision will result in injustice being done."

"xxx xxx xxx If a defendant, who has in fact a complete defence to the claim, has by his own foolishness or carelessness allowed judgment to go by default it appears to me that there will be an injustice, if he is not allowed to put his defence before the Court; and the defendant's fault, if any, can (to use the words of Lord Wright in the same case) "be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."

In the present case, according to the respondent's affidavit, the objections made by the applicant were entertained by the respondent. The applicant was heard and his objections considered. Also his application for extension of time to appeal was dismissed by the Board of Review. No further action was taken by him. Section 80 of the Income Tax Ordinance, 1947, states *inter alia* that where the amount of such chargeable income has been determined on objection or appeal, the assessment as made shall be final and conclusive for all purposes of this Ordinance as regards the amount of such chargeable income. In view of this section, in my opinion, there is no *prima facie* defence to this action. It cannot be said that the applicant has by his own foolishness or carelessness allowed judgment to go by default as he was from the beginning represented by Counsel. In the circumstances the application is dismissed with costs.

Application dismissed.

Solicitors: *Chang Min Tat*; *Gibb & Co.*

ABU HASSAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) November 22, 1961]

[Penang — Criminal Appeal No. 21 of 1961]

Criminal Law and Procedure — Conviction on charge of attempted extortion — Penal Code, s.385 — Whether conviction justified on facts — Whether offence disclosed one under Prevention of Corruption Ordinance, 1950 — If so whether conviction under latter Ordinance could be substituted — Effect of ss.176 and 177, Criminal Procedure Code (Cap. 21).

The appellant, a Customs Officer, was convicted in the Sessions Court, Penang, of the offence of attempted extortion under section 385 of the Penal Code and sentenced to 6 months' imprisonment. The questions on appeal were whether, if the prosecution case was believed (a) the offence disclosed was that of attempted extortion and (b) whether it was open to an appellate Court to substitute a conviction under the appropriate section of the Prevention of Corruption Ordinance if an offence under that Ordinance was disclosed.

Held: (1) the offence disclosed was not that of extortion and if the evidence adduced by the prosecution was to be believed the offence was one under the Prevention of Corruption Ordinance;

(2) for a conviction under the Prevention of Corruption Ordinance to be substituted the test must be whether a charge under that Ordinance could have been framed and tried concurrently with that of extortion. In this instance it could not have been done as (i) the onus is different and (ii) evidence admissible under one charge is not admissible under the other. As the learned President could not have convicted the appellant of an offence under the Prevention of Corruption Ordinance without first amending the charge from one of extortion to one falling under that Ordinance, the appellate Court could not do an act which was not within the competence of the trial court and a conviction under the Prevention of Corruption Ordinance could not therefore be substituted.

Cases referred to:—

(1) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.
(2) *Vincent Lee* v. *Rex* [1949] M.L.J. 296.
(3) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131.
(4) *Nga Po Kyone* v. *Emperor,* A.I.R. 1933 Rangoon 236.
(5) *Begu* v. *Emperor,* A.I.R. 1925 P.C. 130.
(6) *Banta Singh* v. *Public Prosecutor* [1941] M.L.J. 154; [1941] M.L.J. Rep. 127.

CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

Raja Mohd. Redzuan bin Raja Yaacob (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant had been convicted in the Sessions Court, Penang, of the offence of attempted extortion under section 385 of the Penal Code and had been sentenced to six months' imprisonment. From this conviction and sentence he appealed.

Put shortly the prosecution case was that at about 3.30 p.m. on the 11th May, 1961 three persons, two of whom were proceeding to India by boat the following day, entered Swettenham Pier, Penang. The two persons who were to proceed to India the following day, Subramaniam and Palaniandy, were each pushing a bicycle while the third, Thangavelu, was carrying a brief case. While passing the Customs Shed, which is to the right just inside the entrance, Thangavelu was called over by one of the Customs Officers on duty at the Customs Shed, who was the appellant, and asked what the brief case contained. The contents of the brief case was found to consist of travel documents, including passports, cash and gold jewellery, all belonging to Subramaniam and Palaniandy. The cash totalled $1,800 in local currency. The appellant then told Thangavelu that unless he paid the appellant $500 the appellant would report him to higher authority with a view to action being taken against him as the amount of money in the bag was in excess of the total amount of local currency which two people were permitted to export.

The appellant stated in his defence that he thought that the carrier of the bag might have been going to give the contents to some person already on the Pier, as on that day the P. & O. liner "Canton" and another ship were tied up there. The learned Deputy Public Prosecutor conceded that if the appellant had reason to believe that this was so it was within the scope of the appellant's duty to take action because the maximum amount which any one person was at that time entitled to export in local currency was $500.

Briefly the defence was that no demand for $500 had been made but that Thangavelu had got angry with the appellant when the appellant prevented him from taking the brief case on to the Pier and that the allegation subsequently made against the appellant was made as a consequence of this incident in order to put the appellant in trouble.

The first question which had to be decided was whether if the prosecution case was to be believed the offence disclosed was that of attempted extortion. The prosecution conceded that the threat which they alleged had been made by the appellant was a threat to exercise his legal powers. Nonetheless it was submitted that the offence disclosed was extortion, reliance being placed on the observations of Rigby J. in *Loh Kwang Seang* v. *Public Prosecutor.*[1] The learned Judge said:—

> "If A, knowing that B has committed an offence in respect of which it is A's duty to take action against him, threatens to take such action against him unless B pays him a sum of money, and, in consideration of such money being paid by B, forbears to take such action, then A has committed the offences of both corruption and extortion. The offence is 'extortion' because the additional — and I emphasise the word 'additional' — element is present of putting B in fear of injury by the threat of bringing a criminal accusation against him. It matters not whether the accusation be true or false: the offence is completed by the act of obtaining the money as a direct consequence of the threat to bring the criminal accusation".

With respect I am unable to agree with the learned Judge. In *Loh's case* the learned Judge's attention was not drawn either to the case of *Vincent Lee* v. *Rex*[2] or to section 44 of the Penal Code. An essential part of the offence of extortion is putting a person in fear of "injury". In turn "injury" is defined in section 44 of the same Code. There "injury" is harm illegally caused, and it follows that the exercise of legal powers, however done, can never constitute harm. In my opinion, therefore, the offence disclosed was not that of extortion and if the evidence adduced by the prosecution was to be believed the offence was one under the Prevention of Corruption Ordinance, 1950.

The next question which required to be answered was, assuming that the prosecution story was to be believed, is it open to an appellate Court in such circumstances to substitute a conviction under the appropriate section of the Prevention of Corruption Ordinance? I would again refer to the judgment of Rigby J. in *Loh's case,* in which the learned Judge discusses at length the power of an appellate Court to alter a finding by substituting a conviction under a different provision of the law for the conviction found by the lower Court. The learned Judge stated that it was always open to a subordinate Court, without amending the charge, to convict the accused of a different charge providing that that charge in itself constituted a complete minor offence composed of constituent elements necessarily included in the offence originally charged. The learned Judge also quoted with approval the judgment of Taylor J. in *Lew Cheok Hin* v. *Regina.*[3] In that case Taylor J. said that there were two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under section 176, and second, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it.

Sections 176 and 177 of the Criminal Procedure Code together with their illustrations read as follows:—

> "176. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of

such offences and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences.

Illustrations.

(a) A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft or receiving stolen property or criminal breach of trust or cheating.

(b) A states on oath before the committing Police Magistrate that he saw B hit C with a club. Before the Hign Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved which of these contradictory statements was false.

177. (1) If in the case mentioned in Section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under that Section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods, as the case may be, though he was not charged with such offence.

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged".

Referring to *Loh's case* again, Rigby J. stated there:—

"But an essential prerequisite, I repeat, to the application of these sections is that the facts are known, but the law applicable to those facts is uncertain at the time of preferring the charges".

With this statement with great respect I am unable to agree. These sections do not say that they are applicable only when the facts are clear but the law is doubtful. Two illustrations are given under section 176 and in each of those illustrations the facts are clearly doubtful. The facts necessary for the offence of theft are entirely different from the facts necessary for the offence of receiving stolen property. As regards the second illustration it is quite clear that what is doubtful is not the law applicable but the facts, that is to say, whether the statement in the High Court was true or the statement before the Magistrate was true. (See *Nga Po Kyone* v. *Emperor*[4]). In the Privy Council case of *Begu* v. *Emperor*[5]. Their Lordships remarked with reference to similar provisions:—

"The illustration makes the meaning of these words quite plain. A man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made".

On the facts of the case put forward by the prosecution there was no room for doubting that those facts, if proved and accepted by the Court, constituted corruption and not extortion. Those facts were all within the knowledge of the prosecution when the charge against the appellant was framed and in fact he was originally charged with an offence under the Prevention of Corruption Ordinance, 1950, but the charge was amended to one of extortion before the case came on for trial. The question therefore which has to be answered is, could a charge under the Prevention of Corruption Ordinance have been framed and tried concurrently with the charge of extortion under section 176? In my opinion the answer to this is no. The case of *Banta Singh* v. *Public Prosecutor*[6] is authority for the proposition that a charge cannot be tried as an alternative if the onus under the substantive charge and the alternative charge is different and evidence admissible under one charge is not admissible under the other. In the Prevention of Corruption Ordinance, 1950 there are special provisions as to evidence and as to accomplices which are not applicable to a charge of extortion under the Penal Code. A charge under the Prevention of Corruption Ordinance, 1950, cannot therefore be tried at the same trial as a charge of extortion under the Penal Code. As a result it would not have been open to the learned President to convict the appellant of an offence under the Prevention of Corruption Ordinance, 1950, without having first amended the charge of extortion to one of an offence under the Ordinance by formulating a charge under that Ordinance. re-charging the appellant with such charge and giving him an opportunity of recalling all or any of the prosecution witnesses. As the appellant was not called upon to plead upon a charge under the Prevention of Corruption Ordinance and as it is not open to this Court sitting in its appellate jurisdiction to do an act which is not within the competence of the trial Court I am unable to substitute a conviction of corruption in place of that of extortion.

As certain aspects of the evidence and how it was dealt with by the learned President were also unsatisfactory it was not in my opinion a proper case in which to order a re-trial.

There was evidence adduced by the prosecution to show that after the appellant had taken possession of the brief case he took the travel documents and $30 out of the brief case and put them on the counter of the Customs Shed to enable the bicycles to be handed in at the appropriate place on the wharf for transhipment to India. Palaniandy, who said he was standing outside the barrier shown in Exhibit P. 1(3) holding his bicycle, said he stretched over the barrier and picked them up. It was not an unreasonable inference, having regard to the distance between the counter and the barrier shown in Exhibit P. 1(3), that this was not true because it was impossible. In addition when the contents of the brief case were checked by Inspector Lim at 5.50 p.m. that afternoon the sum of $1,800 was still intact. There was not, as one might have expected, $1,770, being $1,800 less the $30. These two facts appearing in the prosecution evidence threw some doubt on the accuracy of the prosecution story, but nowhere in his grounds of judgment does the learned President make any reference to either of them.

It was part of the appellant's story that the brief case had never been in his possession and

that, after he and Thangavelu had had the row over Thangavelu not being permitted to go on to the Pier with the brief case, Thangavelu handed the brief case to a porter named Mustapha to look after while he went on to the wharf. The learned President in his grounds of judgment said he could give no weight to the appellant's reference to this Mustapha without the presence of Mustapha himself, "a porter", the learned President said, "whose whereabouts, the 1st accused says, is yet not known . . . .". But the defence called a witness, D.W. 1, to say that he knew a porter named Mustapha who had gone to India and that Mustapha had told him that "he had an important case and so he had to go". This witness was not challenged by the prosecution. What more could the appellant do? It is not an unreasonable inference to draw that Mustapha had gone to India in order to avoid getting mixed up in this case.

The grounds of judgment dealing with the evidence of D.W.2, a Customs Officer, a witness for the prosecution who was not called by them, but was called by the defence, call for comment in two respects. First, the learned President said that D.W.2 could not be believed when he said that declarations were made at the Customs Shed at Swettenham Pier, whereas in fact all declarations according to P.W.9, a more senior Customs Officer, were made not at the Pier but at Customs Headquarters. It does not appear to have occurred to the learned President (what I would have thought was a matter of common knowledge and which was conceded by the learned Deputy) that there are two types of declarations, written and verbal. Written declarations can only be made between certain times at Customs Headquarters, while verbal declarations made by the individual owner accompanying his own goods can be made at the Pier at any time. Second, he said that "from the whole evidence of this witness (D.W.2) I find he did not make such a detailed check of the things in the Customs Shed to know anything about the handbag (brief case) (Exhibit P.3) as he professed when he took over duty at 4.00 p.m.". Now the prosecution had tried to discredit this witness by using his statement to the police but the learned President refused to let them do so. This statement had been made to the police on the 13th May, 1961, which was two days after the incident had taken place, and must have been substantially similar to his evidence in Court or the learned President would have allowed its use to discredit the witness. The witness was therefore at least consistent and there was really no justification for disbelieving him, although he may have been mistaken as he himself admitted.

There were originally two accused persons but one of them had been acquitted at the close of the prosecution case. Now Palaniandy had made a most damning allegation against the 2nd accused which, if believed, was quite sufficient on its own to justify his being called upon for his defence. If P.W.6 could not be believed in relation to the 2nd accused why should he be believed in relation to the appellant?

Prosecution witness Suppiah had telephoned to the Deputy Chief Police Officer and given him certain information and later had telephoned him a second time. In his evidence the Deputy Chief Police Officer (P.W.4) omitted to make any mention of Suppiah having said the first time he telephoned that a demand had been made for $500, until right at the end of his examination-in-chief. After the first of such telephone calls P.W.4 took no further action, having told Suppiah to tell his friends to make a report. It was only after Suppiah had telephoned a second time some 2 hours later that P.W.4 instructed, amongst others, Inspector Lim (P.W.14) to take action. I think it most unlikely that an experienced police officer like P.W.4 would do nothing after having been informed of a complaint of demand by a Government servant for $500. It occurs to me that P.W.4 might have been mistaken when he said he was informed of the demand for $500 on the first telephone call, and it might well have been in fact that he was not so informed until the second telephone call. This would have tended to support the appellant's story that he was being put in trouble.

I was in agreement with Mr. Jag-Jit Singh's assessment of the evidence when he said "The whole story has not come out".

I accordingly allowed the appeal and quashed the conviction and sentence.

Appeal allowed.

Re ABDUL AZIZ'S APPLICATION

[O.C.J. (Rose C.J.) December 1, 1961]

[Singapore — Summons in Chambers No. 1139 of 1961 in O.M. No. 36 of 1961; Summons in Chambers No. 1140 of 1961 in O.M. No. 37 of 1961]

Contempt of Court — Application for attachment for criminal contempt relating to proceedings in an inferior Court — Procedure applicable — Singapore R.S.C. Preliminary r.2 — Whether English Order 59 rr.3, 6 and 26 apply — If applicable whether obligatory — Effect of non-compliance — Leave of State Advocate-General.

The applicant commenced proceedings by originating motions for orders *nisi* that the two respondents do show cause why writs of attachment should not issue respectively against them for what was alleged to be contempt of Court in their respectively publishing a statement allegedly relating to a case then pending in a Criminal District Court and in which the applicant was an accused person. The proceedings were intituled, *inter alia*, "In the Matter of the Courts Ordinance, section 11(1) and Order XLII r.1" (i.e. of the Rules of the Supreme Court, Singapore) and a form of procedure purportedly governed by this rule was followed. Having issued the originating motions the applicant applied *ex parte* to a Judge in Chambers for leave to serve the respective notices of motion. The respondents entered conditional appearance and applied by Summonses in Chambers to set aside the respective notices of motion and all subsequent proceedings on the grounds of various procedural defects.

The grounds of the application were similar and were as follows:—